No. 490.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HOWARD INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error.

vs.

S. SILVERBERG AND WILLIAM C. PEASE,

Defendants in Error.

Brief For the Plaintiff in Error.

In Error to the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

HOWARD INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
S. SILVERBERG and WILLIAM C. PEASE,
Defendants in Error.

Brief on Behalf of the Plaintiff in Error.

This action is based upon an undertaking on appeal executed by the defendants and dated August 9, 1892. The appeal was to the General Term of the Superior Court of the City of New York from a judgment entered in such Superior Court February 1, 1892. The condition of the undertaking was that the defendants should pay all costs and damages which might be awarded upon the appeal, and if the judgment appealed from should be affirmed, that they would pay the amount thereof. The judgment was affirmed on the 15th day of January, 1894, and notice of such affirmance immediately served. On December, 13, 1894, an appeal from this judgment of affirmance was taken to the Court of Appeals of New York, which, in the year 1896, affirmed the judgment appealed from. This action was commenced in December, 1897. To the complaint a demurrer was inter-

posed on the ground that it did not state facts sufficient to constitute a cause of action, that the cause of action was barred by the provisions of the Code of Civil Procedure of this State and that the complaint was uncertain, unintelligible and ambiguous. After argument, the demurrer was sustained on the ground, as will appear from the opinion of the court constituting part of the record, that the plaintiff's cause of action was barred by the provisions of section 339 of the Code of Civil Procedure. The errors complained of, therefore, are that the court erred (1) in sustaining such demurrer and (2) in ordering the action dismissed without giving the plaintiff any opportunity to amend its complaint.

We shall contend: (1) that under the allegations of the complaint it appears that the undertaking was executed in California and the court therefore erred in sustaining such demurrer; (2) that whether the general allegation on this subject is conclusive or not, the undertaking must, nevertheless, be regarded as not executed out of the State of California, and the action therefore must be held to have been brought within time and (3) that the statute relied upon was not intended to exclude from the courts of the United States a cause of action on the ground that it arose in, or existed in favor of a resident of, another State, nor was such statute intended to discriminate in the Courts of the United States, between causes of action arising in different states, and if it was so intended, it cannot be permitted to have that effect.

I.

The allegation that the Undertaking on appeal was made, executed and delivered within the State of California (page 5) is necessarily admitted by the demurrer, and is conclusive against the defendants.

The undertaking was signed in San Francisco and sworn to before an officer acting in California (p. 7), in support of an appeal in New York. Under such circumstances, it might be regarded as a contract of either State according to the intention, understanding or agreement of the parties. An agreement that it should be regarded as a California contract is binding on the parties thereto.

Penn. &c Ins. Co. v. Mechanics &c Co. 72 Fed. Rep. 413; 73 Fed. Rep. 653.

Union C. L. Co. v. Pollard, 94 Va. 146; 64 Am. St. Rep. 715.

In re Missouri Steamship Co. L. R., 42. Ch. Div. 321.

Greismer v. Mutual &c Assn., 10 Wash. 202.

The intention of the parties as to what shall be deemed the place of contract controls.

Wilson v. Lewiston M Co., 150 N. Y., 314; 55 Am. St. Rep. 680.

Residents of different states, entering into a contract for the borrowing or lending of money are at liberty

to agree by the laws of which state it shall be governed. Hence if the rate of interest allowable in one state is higher than that allowed in another, they may adopt the laws of the former, and thus free the contract from the taint of usury.

Bigelow v. Burnham, 38 Ia. 120; 2 Am. St. Rep. 294.

McAllister v. Smith, 17 Ill. 328; 65 Am. Dec. 651.

Wayne County v. Low, 81 N. Y. 566; 37 Am. Rep. 533.

Dugan v. Lewis, 79 Tex. 246

Kilgive v. Dempsey, 25 Oh. St. 614; 18 Am. Rep. 306.

Pack v. Mayo, 14 Vt. 33; 39 Am. Dec. 205.

Kennedy v. Wright, 21 Wis. 340; 94 Am. Dec. 543.
Cromwell v. County of Sac. 96 U. S. 51.
Tilden v. Blair, 21 Wall. 241.

It was, therefore, competent for the parties to agree that this undertaking should be deemed executed and delivered in California, and should have the attributes and be enforceable by the remedies of a California contract, and, under the allegations of the complaint, it must be presumed that they did so and did whatever was necessary to make it a contract made, executed and delivered within this State; for the complaint so avers. That such was the intention of

the parties is apparent from the other parts of the complaint. It is shown therein that the plaintiff was entitled to an undertaking upon which only residents of New York should be sureties, that the appellants applied to the plaintiff to accept as sureties the defendants, who were then residents of California, and that plaintiff then agreed to accept them and to waive the objection of their non-residence in New York. The appellants in the original action, therefore, in effect, requested permission to give a California contract, and the plaintiff therein agreed to accept it. If any action were ever brought upon the contract, it must, in all probability be brought in California, and it is unreasonable to hold that the plaintiff, in relinquishing the advantages of a New York contract, was not understood to be receiving in lieu thereof whatever advantages might result from a California contract.

Aside from the considerations already suggested, we do not see anything in the facts allegea nullifying our allegation that the undertaking was made, executed and delivered in California. Though, it is true, it was to support an appeal in a court of New York, it was competent for the sureties to have signed and verified it here, and to have here delivered it either to their principal or to any one else by a delivery which they had no power to revoke. The plaintiff had, as the complaint shows, already agreed to accept them as sureties, and hence had no discretion to reject them, and the delivery of the undertaking to anyone

in California, to be transmitted to and filed in New York, was a complete and final acceptance of plaintiff's offer to accept the defendants as sureties. The contract was then completed between them in California and was in form and substance a California contract.

II.

The undertaking in question was not, whether completely executed in the State or not, wholly executed out of it, and hence this action is not controlled by section 339 of the Code of Civil Procedure.

In the execution of a writing several acts are essential. Respecting the writing here in question, it was necessary that it should be signed and verified, and that defendants should, after signing and verifying it, have given it into the possession of some other person to be used as an undertaking on appeal. These acts must, under the allegations of the complaint, have taken place within the State of California. We do not think that the filing of the bond in New York can properly be regarded as its delivery. On the contrary, we believe that the delivery was effected by parting with the possession of the bond by the defendants with the intention that it should be used for the purposes of the appeal. (Haywood v. Townsend, 4 N. Y. App. Div. 246.) Conceding, however, in this branch of our argument that something was necessary in addition to what took place in California, and that this something was equivalent to a delivery, still it

was only one of the several things necessary to the complete execution of the bond.

The defendants will contend that the words "execution" and "delivery" are synononious, or, at least, so far so that in construing the statute of limitations, no attention will be paid to any fact other than that of delivery. The delivery of the bond, however, without signing it could no more have been an execution of it than could the signing of it without a delivery. As, therefore, the execution of a contract results from two or more acts, which may take place at different times and places, an execution of a contract may manifestly be partly within and partly without the State. Section 339 manifestly applies to an obligation *wholly executed without* the State. Section 337 to a contract founded upon a writing *wholly executed within* the State. Neither of these applies to a writing executed *partly within and partly without* the State. Such a writing falls, therefore, within the provisions of section 346, declaring in general terms, that actions not otherwise provided for must be commenced within four years after the cause of action shall have accrued. The statute under consideration was, doubtless, intended to apply to transactions taking place wholly without the State, and concerning which it was probable that persons coming into this State and being afterwards sued here might find it difficult or impossible to produce the testimony existing within the State wherein the transaction was both initiated and consummated, and was certainly never intended to

apply to transactions made in this State by its own citizens and so completely consummated that if any thing further were required to their complete execution, it was only some merely formal act.

III.

The undertaking must be regarded as a contract executed in this State, because here the last or final assent thereto was given.

When parties to a contract reside in different States it is deemed made in that State where the last necessary assent was given.

Adams v. Linsell, 1 B. & Ald. 681.

Fine v. Smith, 11 Gray, 36.

Shelby S. T. Co. v. Burgess G. Co., 40 N. Y. Supp. 671.

Dord v. Bounaffes, 6 La. An. 563; 54 Am. Dec. 573.

Whiston v. Stodder, 6 Mart., 95; 13 Am. Dec. 281.

Vassar v. Kemp, 11 N. Y. 441.

Perry v. Mount Hope, 1 R. R. I. 380; 26 Am. Rep. 902.

This is true though such assent is expressed by a letter or telegram which does not reach the person to whom it is addressed until after he has attempted to withdraw his offer or assent.

Brauer v. Shaw, 168 Mass., 198; 60 Am. St. Rep.

Trevor v. Woods, 36 N. Y. 307; 93 Am. Dec. 511.

Taylor v. Merchants' I. Co., 9 How. 390.

Garretson v. North Atchison Bank, 47 Fed. Rep. 867.

In the complaint it is alleged that the persons desiring to appeal, being unable to procure sureties residing in the State of New York, requested the plaintiff to accept as such sureties the defendants herein, who then resided in the State of California; and that the plaintiff thereupon agreed to accept such defendants as such sureties. Such being the case, no further act was required than the signing of the undertaking on appeal by the defendants herein. That was the last act necessary for them to perform. The plaintiff, having already agreed to accept them, had no discretion or option to exercise upon the subject, and could not reject them. The allegations of the complaint, therefore, fall squarely within the line of decisions to which we have referred, declaring a contract to be executed at the place where the last act of assent was given.

The views which we have attempted to state and to support upon this branch of our subject, namely, that as the plaintiff had agreed to accept the defendants herein as sureties upon the undertaking on appeal, no further assent need be expressed nor assenting act be done by anyone after the signing of the undertaking

by the defendants, and therefore that it must be regarded as a valid contract, happily find strong corroboration in a decision by Chief Justice Beatty while a member of the Supreme Court of Nevada, in a case, which is the only one we have been able to discover, considering a statute similar to that here relied upon by the defendants. The statute of limitations of Nevada contained a special provision applicable to instruments obtained, executed or made out of the State. A resident of Nevada visited Sacramento, California for the purpose of borrowing money for himself and his copartner, and having negotiated a loan at Sacramento, there received the amount thereof and drew up a note or bond agreeing to repay it. He signed this instrument at Sacramento and forwarded it to his copartner to be executed by the latter at Virginia City, and then returned to the payee. The execution of the instrument was completed in Nevada as contemplated by the parties, and it was then by some mode not disclosed by the record forwarded to Sacramento and received by the payee. When subsequently sued upon in Nevada, it was contended, as it is here, that the signing of the writing was not its execution, that such execution was not perfected until the instrument was delivered to, and received by, the payee, and as this latter fact must have occured when the note reached him at Sacramento, it was a contract obtained, executed or made out of the State of Nevada, and therefore barred by the statute of limitations of that State. The court held that it was

true that the bond was not of binding effect until delivered, but that its delivery must be held to have been made in Nevada, for the reason that the payee had agreed to accept the note in question and the makers to execute it, and that "the execution was "consummated in Virginia City by the second obligor "signing and sealing it there. After being signed "and sealed by the second obligor, it was sent to the "obligee in Sacramento. It would seem that the "moment the obligors gave it out of their hands "(which was at Virginia City) this made it a de- "livery. Usually a bond must be accepted by the "obligee before the delivery is complete, but where the "obligee has paid the consideration for a bond al- "ready drawn up which is to be executed and sent to "him, we think there is a clear agreement to accept "the bond when executed, and delivery and accep- "tance both date from the moment that the bond is "delivered by the obligor to some person or public "conveyance to be taken to the obligee. If this "bond was sent by mail or express, we think the de- "livery should be held to have been made when it "was deposited in the office for transmission. If sent "by an individual, the bearer must be treated as the "agent of the obligee to accept the bond. In this "view of the case, the delivery took place, according "to the testimony, in the city of Virginia in this "State. The bond, then, was not at the trial of the "case barred by the statute of limitations."

Alcalde v. Morales, 3 Nev. 132, 136.

Applying this reasoning to the case now before the Court the complaint shows that the plaintiff agreed that an undertaking upon appeal might be given by the defendants, who were then residents of California. When the defendants signed the bond and verified the affidavit attached to it, they had manifested the last assent which was necessary to the complete consummation of the contract. The plaintiff here had nothing further to do. It had already waived the provisions of the laws of New York entitling it to sureties resident in that State, and had expressed its willingness to accept the defendants as sureties. It could not afterwards reject them, and therefore, whether they sent the bond to New York by mail or delivered it to the appellants or some other person, to be forwarded there for filing, they must, as suggested by Judge Beatty, be regarded as having delivered it when they deposited it in the mail or when they gave it to some person for the purpose of delivery, he, under the circumstances, being regarded as having at once accepted it on behalf of the obligees.

It has also occured to us that respecting instruments of this class there is and can be no delivery in the sense in which that term is ordinarily employed. The reason why a contract is not deemed to have been executed until its delivery to the obligee is, that until that time he is, under ordinary circumstances, at liberty to refuse to accept it, and, as a contract must have two parties thereto, it cannot be said to be a contract until its acceptance has been manifested by

its delivery to and acceptance by him either actually or constructively. None of this reasoning is applicable to a bond upon appeal; the respondent does not accept it; in truth, he cannot reject it; his most emphatic dissent to it cannot render its provisions any less availing than his entire approval. Therefore as the sureties are the only persons who are required to express their assent, when they have expressed it and allowed the instrument to go out of their possession with the intention that it may and shall be used as an undertaking on appeal, it is complete; it is then executed, and may be regarded as a contract of that State where it was signed and where they permitted it to go from their possession with the intention that it should be used as a perfected instrument and with the knowledge that the obligee was not required to accept it.

The defendants will be able to cite many decisions treating the place of delivery as the place where a contract was executed. None of these decisions were in cases involving the statute of limitations. They were mainly or chiefly causes in which the validity of the contract was drawn in question, and they are, therefore, not pertinent to the question here under consideration, for the reason that the court will always assume that the parties intended to make a valid contract, and where it might be possible to regard it as finally executed at one of two or more times or places, will treat it as having been executed at that which would give it validity. Many decisions

of this character have arisen out of the laws in various States for the better observance of the Sabbath, and it has generally been held that though the preliminary negotiations took place, or the contract was drawn and signed on a Sunday, yet if it was not delivered until upon a secular day, it would be regarded as executed upon that day, and therefore be held valid. A familiar instance of the disposition of courts to hold contracts to be valid arises when a borrower and lender of money reside in different States, the statutes of which regulating usury are materially different, in which case it is generally held that the contract will be regarded as executed in, and a contract of, that one of the States by whose laws it is valid.

Note to Bank of Newport v. Cook, 46 Am. St. Rep. 201.

McAllister v. Smith, 17 Ill. 326; 65 Am. Dec. 651.

Kilgore v. Dempsey, 25 On. St. 413; 18 Am. Rep. 306.

Peck v. Mayo, 14 Vt. 33; 39 Am. Dec. 205.

Kennedy v. Knight, 21 Wis. 340; 94 Am. Dec. 543.

The proposition which we here maintain, that a contract is to be deemed executed at the place where the final assent thereto was given, was conceded by the trial court, which, as will be seen from page 26 of the record, cited authorities in addition to those

cited by us sustaining that position. The error of the trial court, in our judgment, upon this subject was in its assumption that the filing of the bond must, for all purposes. be regarded as its execution. The statute relied upon is not, however, addressed to the filing of any contract or the placing it in any public repository intended for its preservation. Where a bond is given to which the obligee has previously assented, or to which his assent is unnecessary, we think no delivery is contemplated, as that word is usually understood. Generally the execution is not perfect until the paper is in the hands of the obligee, because, until that time, he may refuse to accept it. If, however, by his agreement he has waived the right to reject it, or if by law he has never had such right, then the execution does not require that the paper be placed in his hands, but only that those who intend to be bound by it shall have manifested their assent by attaching their signatures and by parting with their possession of the bond, which is often done by giving it to the principal therein with an intent that he may use it to promote the purpose which it was intended to accomplish.

Ordinarily a respondent may require an appellant to exactly comply with the law with respect to an undertaking on appeal and may move to dismiss an appeal, either because an undertaking has not been filed, or does not in some respect comply with the statute. It is equally true, however, that the respondent may entirely waive an undertaking on ap-

peal, (1 Encyclopedia of Pleading & Practice, 1000,) and as he may waive the whole undertaking, he may doubtless waive any part thereof or any formality connected therewith, including the formality of the filing of the undertaking with the clerk of the court. It is said in the opinion of the court citing Selden v. Delaware &c. Co., 29 N. Y. 634, that it was held that the acceptance by a clerk of a bond required to be filed by him constituted its delivery. This is true, but the question was not presented of whether it might have been regarded as delivered without, or, even in advance of, such filing. In that case it was objected that the bond had not been delivered at all, and it was insisted that, notwithstanding the filing, some other and further delivery was necessary, and the court said, "That doubtless a delivery to the party would be good."

The only case which we have been able to discover precisely upon the point here at issue is that of Haywood v. Townsend, 4 N. Y. App. Div. 346; 36 N. Y. Supp. 517, where it appeared that an executor, being required to give a bond as such, procured the execution of a bond by sureties, and, upon their delivering the bond to him, retained it in his possession and never filed it in court, and that it subsequently came into the possession of one of the sureties, who destroyed it and thereafter insisted when it was sought to hold him liable as a surety of such executor, that the bond, for want of filing with the surrogate, had never been delivered. The court conceded that

the bond should have been filed with the surrogate, but nevertheless held that, so far as the sureties were concerned, it must be regarded as completely executed, saying: "Before he could commence the duties "of his trust, his faithfulness must be guaranteed. "*When they placed in his hands the bond signed by them,* "*their act was finished; they had guaranteed his fidelity,* "*and became responsible for any breach; so far as they* "*were concerned, the delivery was complete; they had de-* "*livered the instrument to him with the intention that* "*their guaranty should be operative; that it should enable* "*him to enter upon the duties of his trust.*" These principles are applicable to this case. The defendants doubtless signed and verified the bond in California, and here gave it to their principals with the understanding that thereby and without any further act on their part their principals would be enabled to prosecute their appeal, without the annoyance of executions issued, or other actions begun, to enforce the judgment. Even if the bond had never been filed at all, it was perfect as far as the sureties were concerned; and the plaintiff if he gave the appellants the benefit of the appeal and the stay of execution could enforce the bond. (See cases cited under point V.)

IV.

The statute relied upon, if correctly interpreted, by the defendants, is an attempt to discriminate against residents of other States and is therefore void.

The statute in question is peculiar in its character,

and so far as we are aware has not been the subject of judicial consideration either State or national. Its manifest purpose is to diminish or limit the right of persons who are not citizens of this State to pursue their debtors therein, and it seems very remarkable that a State statute should have the effect of excluding from one of the national courts a creditor upon the ground that his demand arose or his obligation was executed out of the State, when his action is brought within the time in which an action upon a like obligation might be sustained if it had been executed within the State. It is said at page 490 of the sixth edition of Cooley on Constitutional Limitations that while the precise meaning of the terms "privileges" and "immunities" as used in the Constitution of the United States has not been conclusively settled, it appears to be settled that the constitution secures in each State to the citizens of all other States "the right to the usual remedies for the collection of debts and the enforcement of other personal rights." The Fourteenth Amendment declares that no State shall make or enforce any law which shall *abridge* the privileges or immunities of the citizens of the United States. We apprehend that among the privileges of every citizen of the United States is that of resorting to the courts thereof for the purpose of enforcing obligations existing in their favor, and that it is not possible for a State statute to exclude from the courts of the United States a person because he is not a resident of the State in which the

court is held. This constitutional provision should be given a liberal construction for the purpose of promoting the ends intended to be accomplished thereby. We apprehend that if the statute had declared that an action might be maintained upon a contract in writing within four years, when brought by a resident of the State, and within two years when brought by a non-resident, that it would be unconstitutional, or, at least, that it would be disregarded by the national courts as abridging the privileges otherwise enjoyed by persons who are not residents of the State. Precisely this object is accomplished if the State, instead of making the residence of the owner of an obligation the cause of an abridgment of his privilege to bring the suit thereon, may make the test that of the place where the obligation was executed, for while it may sometimes happen that a written instrument, though in favor of a citizen of this State, may be executed beyond its borders, yet the controlling purpose of statutes of this character is manifestly to abridge the privileges of persons residing outside of the State, because it is in their favor that the great mass of obligations executed outside of the State accrue, and a curtailment of the right to sue upon a written contract executed out of the State must, if effective, be an abridgment of the privileges of citizens of the United States to resort to the courts thereof situated in California within the same time that resort thereto might be had if the contract involved were executed in that State. Whether we are right or not in this portion of

our argument, it appears clear to us that this court will not follow the statute in question unless the case clearly falls within it, and the contract appears to have been wholly executed within the State. We admit that, as a general rule, the statute of limitations of the forum is applicable though the action is brought in another State, but we know of no decision applying this rule when the law of the forum has, as its manifest design, a discrimination against citizens of other States not applicable to its own citizens. We may, for the purposes of this argument, admit that a statute of this character may be enforced in the State courts, (Hawse v. Burgmui, 4 Colo. 313; Bank v. Dalton, 9 How. 521); though all the national decisions upon this subject coming within our observation were rendered prior to the adoption of the Fourteenth Amendment. It is evident, however, that a State statute of limitations cannot be enforced so far as it may be repugnant to the constitution of the United States. Thus, a State statute enacting that no action should be maintained on any judgment or decree rendered by any court without the State against any person who, at the time of the commencement of the action in which the judgment or decree was rendered, was a resident of this State, in any case where the cause of action would have been barred by the act of limitation of this State, if such suit had been brought therein, was adjudged to be unconstitutional and void as destroying the right of a party to enforce a judgment regularly obtained in another State.

Christmas v. Russell, 5 Wall. 290.

It is not necessary for the purposes of this part of our argument for us to insist that this statute of limitations is unconstitutional as applied to our State courts. It is sufficient for our present purpose to say that the spirit to which it owes it origin and the end which it seeks to accomplish are so inconsistent with the constitution and laws of the United States that this statute cannot properly be regarded as applicable to proceedings in this court. The only direct legislative adoption of the statutes of a State for the purpose of controlling the decision of the national judicial tribunals is that found in section 721 of the Revised Statutes of the United States declaring that "the laws of the United States except where the constitution, treaties, or statutes of the United States otherwise require or provide shall be regarded as rules of decision in the trial at common law in the courts of the United States in cases where they apply." This section falls far short of adopting all the statutes of the respective States. Under the influence of the more recent judicial construction of those parts of the Constitution of the United States forbidding States to regulate commerce, to impair the obligation of contracts or to abridge the privileges in any State of a citizen of the United States, this has become substantially a nation, and it is certainly the theory of our present decisions that no citizen of the United States shall in any State be discriminated against either directly or in-

directly because he is not a resident thereof. Thus he cannot be required to pay for a license for conducting in a State a business which a resident may conduct without such license, (Bliss, Petitioner 53 N. H. 135; State. v. Lancaster, 63 N. H. 267;) nor where both are required to take out a license, can a higher price be exacted of a non-resident than of a resident.

Ward v. Maryland, 12 Wall 413.

If, for the purposes of taxation, a taxpayer is entitled to a deduction for debts due from him, he cannot, because he is a non-resident, be deprived of his right to be credited for debts due from him to non-residents of the State.

Sprague v. Fletcher, 69 Vt. 69.

Nor can a statute be enforceable which provides that before any non-resident shall do any insurance business in the State, he shall have property of one hundred and fifty thousand dollars in value.

State v. Hoadley, 37 Fla. 567.

A statute forbidding citizens of certain counties to fish in a designated watercourse without first procuring a license is void as an attempt to deny to them the privileges and immunities of citizens of the State.

State v. Higgins, 51 S. C. 51; 38 L. R. An. 561.

So is a statute forbidding any person to bring sheep within the State without first having them dipped.

State v. Duchuent 39 L. A. An. 365; 51 Pac. 456.

To these decisions many others might be added all tending to sustain the same proposition, namely, that a State has no right to discriminate against a citizen of the United States, because he is a non-resident thereof.

Among the privileges and immunities which a citizen of the United States is entitled to as such is that of resort to the courts of the State, (Corfield v. Coryell, 4 Wash. C. C. 371; Ward v. Maryland, 12 Wall 430;) and it has recently been declared that even when the cause of action arose in a State of which both the parties to the action were residents, the one claiming a right of action thereunder had an absolute right to resort to the courts of another State, and that such courts had no discretion to refer him back to the State of his domicil, and that of his adversary wherein the cause of action was alleged to have arisn, and under whose laws the rights of the parties must necessarily be determined.

Cofrode v. Circuit Judge, 79 Mich. 332.

Eingartner v. Illinois S. Co., 94 Wis. 70.

The judicial power of the courts of the United States is by section 2 of Article III of the constitution extended to all controversies between citizens of different States. This provision, of course guarantees to every citizen of the United States the right to the aid of its judicial tribunals in a controversy be-

tween himself and another citizen when both are not residents of the same State. Can it be fairly held that, having such right, any State can abridge it in the case of one citizen more than in the case of another, or, in other words, will a court of the United States discriminate against a citizen thereof because he is not a resident of the State in which it sits? Probably it will be not claimed that such a discrimination can be made, but it will be said that the present statute discriminates against a cause of action rather than against its owner, and that the discrimination would be the same were the plaintiff a resident of the State. It is true that in isolated instances a writing may be executed out of the State in which suit is brought, but in favor of a resident thereof. It is clear, however, that such a case is exceptional, and that, as the great bulk of contracts executed beyond the State are between non-residents, the object of this statute must have been to protect persons within the State from the demands of persons without the State, and hence that the practical and intentional operation of the statute must be to abridge the right of a non-resident to sue by compelling him to institute an action against his debtor within a much shorter time than would be required in a contract of an identical character executed to, or in favor of, a resident of the State. It is always permissable, and perhaps obligatory, for a court to look beyond the form of an enactment for the purpose of discovering its substance and object, and unless these be innocent, it cannot be up-

held. As was said in Yick Wo. v. Hopkins, 113 U. S. 273, wherein an ordinance was declared invalid partly upon the ground that, as administered, it discriminated against Chinese residents, "Though the "law itself be fair on its face and impartial in appear- "ance, yet if it is applied and administered by public "authority with an evil eye and an unequal hand, so "as practically to make unjust and illegal discrimi- "nations between persons in similar circumstances, "material to their rights, the denial of equal justice "is still within the prohibitions of the constitution."

That section 721 of the Revised Statutes is not an absolute and complete adoption of the State laws is evident from the decision in the Virginia coupon cases, 114 U. S. 270, 303. The coupons there in question when issued were receivable at and after maturity in payment of all taxes, debts and other demands due the State. Subsequently the State by its Legislature provided, in substance, that no action of trespass or trespass on the case should be brought against any tax collector who seized property notwithstanding the coupons had been tendered in payment of taxes, and in effect, limited the right of the aggrieved party to an action of detinue. The court said that section 721 of the Revised Statutes made an express exception in reference to the adoption of State laws as rules of decision of the cases where the constitution otherwise required, "which it does whenever the adoption of the "State law deprives a complaining party of a remedy "essential to the vindication of his right or that right

"is derived from, or protected by, the constitution of "the United States."

The legislature of Illinois undertook by statute to make the law of lis pendens applicable to negotiable instruments not yet due for the purpose of binding purchasers of such instruments by a judgment entered respecting them after the purchase but in an action previously commenced. The court held that this statute would not be accepted by it as controlling the rights of non-resident purchasers of such coupons pendente lite.

Enfield v. Jordan, 119 U. S. 630.

V.

It may be insisted that the complaint does not state facts sufficient to constitute a cause of action, because the plaintiff did not exact a bond with sureties residents of the State of New York, and might, had it chosen to do so, have refused to accept the undertaking sued upon, and have proceeded to take out execution on its judgment.

But the averments of the complaint show the acceptance of the bond by plaintiff and the actual stay of execution, and that the defendants and the appellants had the full benefit of the appeal and stay. These waivers on the part of the plaintiff are expressly sanctioned by the laws of New York, and make the undertaking effective for all purposes.

C. C. P. of N. Y., sec. 1305.

Independently of this statute it has always been held that sureties on an appeal bond, if the appellant has had the benefit thereof and of the stay contemplated thereby, are estopped from urging any irregularity or insufficiency therein ; and if the undertaking is not good as a statutory undertaking it is always held valid and enforceable against the sureties as a common law obligation. As to sureties on official bonds, they are bound whether it conforms to the terms of the statute or not; Tevis v. Randall, 6 Cal. 633, where bond was joint, instead of joint and several; Baker v. Bartol, 7 Cal. 551, where the court had no power to exact the bond, but the defendant received benefit from it; Gardner v. Donnelly, 86 Cal. 367, where conditions of undertaking to release attachment were more onerous than the law required;

Stephens v. Crawford, 1 Ga. 574; 44 Am. Dec. 680.

Kincannon v. Carroll, 9 Yerg, 11 ; 30 Am. Dec. 391.

Classon v. Shaw, 5 Watts, 468; 30 Am. Dec. 338.

This rule has frequently been applied to undertakings in appeal ; and the rule asserted that failure to conform to conditions intended for the benefit of respondent does not release the sureties; Dore v. Covey, 13 Cal, 502. where it was urged (p. 509) that the undertaking did not, as required by statute, show the residence or occupation of the parties and was not in double the amount of the

judgment. This case shows that the appellant is the only person who can raise objections to the undertaking; Hathaway v. Davis, 33 Cal. 169, where it was held that the fact that the appeal was not taken in time could not be urged if the judgment was affirmed; Murdock v. Brooks, 38 Cal., 596-601, where sureties claimed release because they did not justify so as to stay execution;

Van Deusen v. Hayward, 17 Wend. 67;

Goodwin v. Bunzl, 102 N. Y., 224, where from a judgment in replevin the undertaking was in the form for an appeal from a money judgment and the court held that the mere forbearance of respondent entitled him to prosecute his action against the sureties.

Granger v. Parker, 142 Mass. 186, where it was insisted that the security on appeal should have been by recognizance instead of by bond.

Pray v. Wasdell, 146 Mass. 324, where the condition of the bond was not that required by the statute.

Meserve v. Clark, 115, Ill. 580, where both defendants were required to give a bond, and only one gave it.

George v. Bischoff, 68 Ill. 236.

The defendants will be able to cite decisions showing the inadequacy of bonds upon appeal when not given in the form and under the circumstances pres-

cribed by statute, but on an examination of these decisions it will be found that they were made in response to objections interposed by the respondent and not in response to claims made either in behalf of the appellant or the sureties. It is doubtless true that a respondent who has not waived the right to object to a bond upon appeal may insist that it does not comply with the statute and that the appeal be dismissed or that a stay of execution be not granted where the appellant has not given the bond necessary to support such appeal or such stay. Where, however, the respondent has either expressly or impliedly accepted or acted upon the bond given, it will be regarded as a good and sufficient common law bond, whether it conforms to the statute or not. The cases which we have cited abundantly establish this. To make their pertinency more clear we shall, however, take the liberty of making some quotations from some of them. Thus the case of Van Duesen v. Hayward, 17 Wend. 67 was an action against the sureties upon an appeal bond, the trial court held that the sureties were not liable, because the bond was not conformable to the statute, in this, that its condition was that the appellant should, if judgment were rendered against him, pay the judgment and costs or SURRENDER HIS BODY IN EXECUTION. It was said, as will probably be said here, that the respondent might have quashed the appeal, or, at least, have taken out an execution notwithstanding the giving of this bond. The Supreme Court, after re-

ferring to certain decisions relied upon by the sureties, said: "Within the principle of these decisions "the appeal of Hayward might have been quashed on "motion, because the bond was less beneficial to the "plaintiffs than the statute required. But the plain-"tiffs made no objection to the sufficiency of the bond. "Hayward has had the full benefit of his appeal, and "I think the defendants should not now be allowed "to object that their own voluntary obligation was "less onerous than it should have been. I will not "say that this opinion can be reconciled with all the "decisions that have been made in relation to appeal "bonds, nor that all the cases on that subject are en-"tirely consistent with each other; but upon general "principle I think the defendants should not be heard "to make that objection." In a much later case in the same State, that of Goodwin v. Bunzl, 102 N. Y. 224, which was also an action upon an appeal bond, the sureties sought to escape liability on the ground that the judgment appealed from was a judgment in replevin for the possession of personal property, while the undertaking on appeal, instead of being in the form appropriate to stay an execution upon that class of judgments, was in the form prescribed for the appeal from a mere moneyed judgment. The sureties insisted that, as the undertaking which was in fact given by them did not entitle the appellant to a stay of execution, that there was no consideration for their obligation, no detriment to the respondent, and therefore no right of recovery in the present action.

The Court of Appeals in affirming a judgment against the sureties said that the giving of the undertaking in the case was an idle ceremony unless intended to secure some object, that the attorneys on both sides had treated it as appropriate and effectual, and that no proceedings had been taken to enforce the judgment after the termination of the appeal. The court said: "The transaction was in legal effect a forbear-"ance on the part of the plaintiffs, at the request of "the defendants, to pursue their legal remedy against "the defendants pending the appeal, in consideration "of the undertaking. The undertaking was in the "form prescribed by section 1327 of the code for "undertakings to stay execution on moneyed judg-"ments. It was not in the form of the statutory un-"dertakings to stay proceedings on an appeal from "a judgment for the recovery of chattels. But the "undertaking was not illegal; it was not taken color "officii and it is founded on a good consideration. It "should be held, we think, to enure as a good common "law agreement enforceable according to its terms. "This conclusion accords with the sense of justice "and is not precluded by the authorities."

In the case of Hill v. Burke, 62 N. Y. 111, sureties upon an appeal bond defended an action brought against them on the ground that there was no proof of the service of the notice of appeal or of the filing of it with the clerk or of a service of a copy of the undertaking on the plaintiff, as required by the Code, and that the undertaking was of no effect because no

affidavit was made by the sureties to the effect that they were worth double the amount specified in the undertaking, as required by the Code, and that if the undertaking was effective for any purpose, it was not operative to stay an execution, and that the sureties were, therefore, liable only for the costs of the appeal. The court held, as to the first question, that the affirmance of the judgment by the Court of Appeals conclusively established the facts necessary to the perfecting of the appeal and the giving of the appellate court jurisdiction. As to the second proposition, the court held, notwithstanding the provision of the Code declaring that an undertaking on appeal shall be of no effect unless accompanied by the affidavit of the sureties that they are worth double the amount named therein, such undertaking "is not necessarily "a nullity in the sense that it is not obligatory " simply because it was not accompanied with such an " affidavit of justification of the sureties as the Code " prescribes. While, therefore, such an undertaking " might not operate as a stay of proceedings, and the " appeal might be dismissed for irregularity upon " motion of the respondent, it does not relieve the " sureties from the liability they have taken upon " themselves. It still remains an obligation for them " to perform if the judgment is affirmed. The object " of the provision was, no doubt, to protect respondents " against insufficient sureties upon an appeal, and " the section also provides for an exception by him to " the sufficiency of the sureties and their subsequent

"justification; but it was not intended, I think, that "the sureties should escape because there was an in- "formality in the justification or that it was not "strictly in accordance with the Code. So long as "the undertaking was in due form, in accordance with "the statute, and the appellant received a full con- "sideration for the bond by a stay of proceedings on "the judgment until the appeal was decided, there is "no sufficient reason why the sureties should be "exonerated." In employing this language the Court of Appeals substantially adopted the conclusions of the Superior Court of the City of New York announced there forty years ago in the case of Gibbons v. Burhard, 3 Bos. 635, where the objection was in behalf of the sureties that it did not appear that they had justified as required by statute, that the execution therefore was not stayed, and that there was no sufficient consideration for the undertaking on appeal. We have referred at some length to the decisions in New York, for the reason that the defendants insist that this is a New York contract. Doubtless it was a New York contract in so far only that it was intended by all the parties to entitle the appellant to the privileges of an appeal and a stay of execution under the laws of New York, and to subject the sureties to liabliity for the amount of the judgment if such appeal should result in its affirmance. The California cases upon this subject are quite as conclusive as are those of New York. In truth, our courts, at a comparatively early day in Dore v.

Covey, 13 Cal. 502 quoted and adopted the opinion from 17 Wendell which we have already cited, adding, "The respondent's argument that the under-"taking shall not stay execution unless made in pre-"cise conformity with the statutory rules is answered "by the authorities cited, which hold in effect, that "these provisions are intended for the benefit of the "other party, and that he may waive them just as "if the statute declared that no judgment should be "rendered without service of process, but the de-"fendant might waive the process or the service. "This waiver was made by the plaintiff below. He "considered the appeal as regularly made, made no "motion to dismiss, issued no execution, and suffered "the undertaking to have the full effect of a regularly "executed instrument." In the case of Hathaway v. Davis, 33 Cal. 169, sureties on an appeal bond sought to escape liability on the ground that no appeal had in fact been taken. The court answered: "Nor is the point that the appeal from the judgment "was not taken within the time, and that for that "reason the undertaking of the sureties was without "consideration, available to the defendants. Concede "that the undertaking did not operate to legally stay "proceedings upon the judgment, (a point which we "do not decide,) yet it in fact had that effect, and the "appellants received all the benefit for which their "sureties contracted, and were they allowed now to "say that their undertaking was nudum pactum, "gross injustice might be done to the plaintiff be-

"cause he did not choose to act upon a doubtful
"right. Moreover, they cannot be allowed to ques-
"tion the validity of the judgment of affirmance on
"the score of jurisdiction, or upon any other ground
"—it is conclusive upon them upon all points upon
which it acts." Murdock v. Brooks, 38 Cal. 596 is
another of the many illustrations that sureties upon
an appeal bond, after securing to the appellant the
advantages of an appeal, will, upon the affirmance of
the judgment, interpose objections to their acts and
seek to escape liability upon the ground that the re-
spondent might have objected to the undertaking had
he chosen to do so. In this case it was insisted that
the sureties had not justified, and therefore that there
was no stay of execution. Judge Sanderson in his
peculiarly clear and forcible language said: "Whether
"the undertaking was accompanied by the affidavit of
"the sureties does not appear upon the face of the
"complaint, but it does appear from the facts there
"stated that further proceedings were never taken
"upon the judgment, and that Brooks had the full
"benefit of a stay pending his appeal. Such being
"the case, can he or his sureties be heard to say that
"the undertaking is void because all the forms of the
"statute, THROUGH THEIR OMISSION, were not
"complied with? It seems to be settled that the failure of
"the sureties to justify, if such was the case, constitutes
"no defense. This rule is deduced from the proposition,
"which no one disputes, that a party may waive a
"compliance with statutory conditions which are

"merely directory and intended solely for his benefit. "The provisions of the statute which require the "residence and occupation of the sureties to be stated, "the penalty of the undertaking to be double the "amount of the judgment, and the affidavit of the "sureties that they are worth the amount specified in "the undertaking over and above all their just debts "and liabilities, exclusive of property exempt from "execution, are directors and a compliance therewith "may be waived by the respondent either expressly "or impliedly by failing to take any advantage of "their non-observance and treating and accepting the "undertaking as sufficient."

VI.

As to whether an action might have been maintained prior to the final decision of the action by the court of appeals, and notwithstanding the appeal thereto, we venture to suggest that the recent decisions in California have determined that it is not until the right of appeal has terminated that a judgment can be deemed final, so as to support an action thereon, or to warrant the reception of such judgment in evidence as proof of a right.

Naffzgir v. Gregg, 99 Cal., 83.

Harris v. Barnhardt, 97 Cal., 546.

In re Blythe, 99 Cal., 472.

Under these decisions we do not see how an action could have been maintained in this State before the

judgment of affirmance in the court of appeals, and hence *our* statute of limitations could not commence running before that time.

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